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No. 09-98

IN THE
# Supreme Court of the United States

WILMER LEE SCURLARK,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The Government's brief in opposition does not dispute the exceptional importance of the question presented by this case. Indeed, the Government would be hard pressed to make such an argument, as this issue is squarely presented for hundreds of federal defendants in the wake of the recent revisions to the crack-cocaine Sentencing Guidelines.

In a recent en banc petition, which the Government emphasized had been "personally approved" by the Solicitor General, the Government argued that the same issue presented by this case "involves questions of exceptional importance: the meaning of 18 U.S.C. § 3582(c)(2) and the finality of plea agreements entered pursuant to Fed. R. Crim. P. 11(c)(1)(C)." *See* Gov't Petition for Rehearing En Banc at 3, *United States v. Dews*, vacated opinion reported at 551 F.3d 204 (4th Cir. 2008) (No. 08-6458); *id.* at 11 (explaining that "[m]ore than 600 cases seeking sentence modification based on the crack cocaine sentencing guideline reduction have been filed in the District of Maryland" alone and that there are thousands pending throughout the country).

Despite the undeniable importance of the question presented, the Government contends that certiorari is not warranted because the Circuits have adopted a uniform and "decidedly categorical" (Opp. 9) approach in holding that a district court *never* has the power under 18 U.S.C. § 3582(c)(2) to reduce a sentence resulting from a Rule 11(c)(1)(C) plea agreement.

The Government is mistaken. While the Eighth Circuit has indeed adopted a categorical approach, other Circuits have taken different paths. The Third

Circuit looks to "what the District Court considered in sentencing the defendant." If the court considered the Guidelines, the sentence may be reduced. *See United States v. Sanchez*, 562 F.3d 275, 282 (3d Cir. 2009). The Sixth Circuit, on the other hand, permits sentence reductions in Rule 11(c)(1)(C) cases if there had been "an agreement of the parties." *See United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004). These approaches are in stark conflict with the approach followed by the Eighth Circuit, which holds that a district court may *never* reduce a sentence arising from a Rule 11(c)(1)(C) agreement, regardless of what the district court considered in imposing the sentence or what bargain the parties may have once struck.

In fact, the conflicts in the Circuits have recently been compounded. The Tenth Circuit, in *United States v. Cobb*, --- F.3d ---, 2009 WL 3418214 (10th Cir. Oct. 26, 2009), has squarely held that a district court *does* have the power under § 3582(c)(2) to reduce a sentence in cases where there was a Rule 11(c)(1)(C) plea agreement if the plea agreement linked the sentencing disposition to the Guidelines. The Tenth Circuit reversed the district court's holding that it lacked jurisdiction to reduce the sentence and remanded for consideration of the defendant's § 3582(c)(2) motion. In fact, the Tenth Circuit expressly acknowledged that its decision conflicts with the Eighth Circuit's holding in this case. *See* 2009 WL 3418214, at *4 (recognizing circuit split and citing *United States v. Scurlark* as a "*But see*").

The Tenth Circuit's ruling only confirms what was previously clear: certiorari is warranted to resolve the conflicting approaches in the lower courts and to answer what even the Government concedes is a recurring question of enormous importance. Un-

der the current state of affairs, defendants in the Third Circuit are eligible for sentence reductions if they can show the district court considered the Guidelines in approving the plea agreement and imposing the sentence; in the Sixth Circuit, defendants are eligible if at the time of their plea they had an agreement allowing for future sentence reductions; and in the Tenth Circuit, defendants are eligible if they can show that their plea agreement linked their sentence to the Guidelines. But in the Eighth Circuit, defendants are simply out of luck. These would be intolerable conflicts in any area of federal law, but they are *particularly* intolerable in the area of sentencing, where this Court has emphasized the importance of "secur[ing] nationwide consistency." *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

This Court should grant review.

## I. THE CIRCUITS HAVE ADOPTED CONFLICTING APPROACHES TO THE QUESTION PRESENTED

The Government errs in denying the existence of a conflict.

1. As an initial matter, there can be no dispute that the Tenth Circuit's decision is in direct conflict with the Eighth Circuit's decision in this case. *Cobb* is identical to this case in all relevant respects: the defendant pleaded guilty, was sentenced after entering into a Rule 11(c)(1)(C) agreement, and later moved for a sentence reduction under § 3582(c)(2) based on the recent amendment to the crack-cocaine Guidelines. The district court held that it lacked jurisdiction to reduce the sentence because the sentence had been "based on" the plea agreement rather than the Guidelines.

The Tenth Circuit reversed, holding that the sentence had been "based on" the Guidelines because the "sentencing disposition was tied to the guidelines at every step." 2009 WL 3418214, at *3. The court explained that "the parties' negotiations and the stipulated sentence focused on the later-lowered sentencing range." *Id.* Moreover, "the parties expected the district court to independently determine and consider the applicable guidelines range in imposing the sentence — and the court did so." *Id.* at *4. Therefore, the Tenth Circuit held, the sentence stipulated in the Rule 11(c)(1)(C) plea agreement had been "based on" the Guidelines. The court reasoned that "sentences need not be based solely" on the Guidelines "to fall within the reach of § 3582." *Id.* Rather, the statute applies to any sentence that is "based in any way on a qualifying sentencing range. No other connection is required." *Id.*

Whereas the Eighth Circuit held here that a Rule 11(c)(1)(C) sentence can never be "based on" the Guidelines, Pet. App. 3a-5a, the Tenth Circuit held that "[i]t is simply unrealistic to think that the applicable guideline range is not a major factor (if not *the* major factor) in reaching a stipulated sentence." 2009 WL 3418214, at *5 (emphasis in original). In fact, the Tenth Circuit expressly acknowledged that its holding conflicted with the Eighth Circuit's in this case. *Id.* at *4.

2. The Government is wrong in contending that the Third Circuit's decision in *United States v. Sanchez*, 562 F.3d 275 (3d Cir. 2009), does not conflict with the Eighth Circuit's decision below. According to the Government, "the Third Circuit's approach is decidedly categorical" in that it does not depend on what the district court considered in imposing the sentence. Opp. 9. But the Government's reading

cannot be reconciled with the text of the Third Circuit's opinion. The Third Circuit held that a sentence is "based on" "*what the District Court considered* in sentencing the defendant." 562 F.3d at 282 (emphasis added); *see also id.* at 282 n.8 ("Sanchez's sentence is 'based on' whatever the District Court considered in imposing it . . . ." ).

In fact, the Third Circuit emphasized that the district court "stated that it was departing from the Guidelines range due to the binding plea agreement," and "there [was] nothing in the record to support [the defendant's] assertion that the parties based the [sentence] on a Guidelines calculation." *Id.* at 277, 282. Indeed, the parties had apparently never even reduced their plea agreement to writing, but had simply presented the district court with a proposed sentence. *Id.* at 277, 280. Accordingly, the Third Circuit could only "speculate about how they came to that number." *Id.* at 282.

Thus, it is hardly surprising the Third Circuit would conclude, in light of its understanding of § 3582(c)(2), that *that particular plea agreement* was not "based on" the applicable sentencing range because there was no evidence that it referred to the Guidelines or that the district court considered the Guidelines in approving the agreement and imposing the sentence. It follows that if the parties *had* based the sentence on a Guidelines calculation, the district court naturally would have "considered" the Guidelines in sentencing Sanchez, and he therefore would have been eligible for a reduction.

Under the Third Circuit's approach, Mr. Scurlark would have been eligible for a sentence reduction, as the record in this case is replete with evidence that the district court based his sentence on the Guide-

lines. The plea agreement stated that Mr. Scurlark "[would] be sentenced in accordance with the applicable Sentencing Guidelines" and set forth the parties' view as to how the Guidelines should be applied. Pet. App. 13a. And during the plea hearing, the district court emphasized that portion of the agreement, reviewed the presentence investigation report, and then accepted the agreement, concluding that the proposed sentence was "appropriate." Pet. App. 51a-52a.

The Ninth Circuit takes an approach that squares with the Third Circuit's approach (and conflicts with the Eighth Circuit's approach). In *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009), the court declined to adopt a categorical rule and instead held that it is "the terms of the plea agreement [that] are key to determining whether the defendant's sentence was, in fact, based on" the Guidelines. Thus, in the Ninth Circuit as well as the Third Circuit, Mr. Scurlark's plea agreement — which expressly incorporated the Guidelines — would clearly have been "based on" the Guidelines, contrary to the conclusion reached by the Eighth Circuit.

3. The Government concedes, albeit grudgingly, that the Sixth Circuit follows a different approach than those of the Third and Eighth Circuits. Opp. 10 (the Sixth Circuit and Eighth Circuit approaches are "substantially similar"). Indeed, in *United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004), the Sixth Circuit explicitly *rejected* a categorical approach, explaining that a district court may reduce a Rule 11(c)(1)(C) sentence if there has been "an agreement of the parties." There is no possible way to reconcile the Sixth Circuit's holding with the decision below, which admits of *no* exceptions.

The fact that the Sixth Circuit "did not indicate what kind of 'agreement of the parties' might" suffice (Opp. 11) is completely irrelevant to whether its approach conflicts with those of other Circuits. The quoted language reinforces that certiorari is warranted because it demonstrates how some courts are permitting the parties to preserve the district court's power to reduce a sentence by agreement, while others foreclose it entirely.

4. Finally, the Government argues that in all the cases cited in the petition, the courts denied the request to reduce the sentences. Opp. 10. Apart from no longer being true after *Cobb*, it obviously does not mean that the courts' approaches are consistent with one another, and as shown above, they are not. The Circuits have staked out differing and conflicting approaches to the threshold question of eligibility, as have the district courts, many of which have followed the Tenth Circuit's reasoning and relied on § 3582(c)(2) to reduce sentences imposed pursuant to Rule 11(c)(1)(C) plea agreements. *See, e.g.*, *United States v. Allen*, 2009 WL 961468, at *3-4 (N.D. Cal. Apr. 8, 2009); *United States v. Pichon*, 2009 WL 1076709, at *1 (E.D. La. Apr. 16, 2009); *United States v. Coleman*, 594 F. Supp. 2d 164, 168 (D. Mass. 2009).

## II. THE DECISION BELOW ALSO CONFLICTS WITH *GALL*

In *Gall v. United States*, 128 S. Ct. 586, 596 (2007), this Court held that "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range. . . . [T]he Guidelines should be the starting point and the initial benchmark." *Id.* (emphasis added). The Court made no exception for convictions reached by plea

agreement, nor does the Department of Justice, *see, e.g.*, Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors (Jan. 28, 2005), http://www.justice.gov/dag/readingroom/memo-01282005.pdf.

The Government insists that the decision below does not conflict with *Gall*, reasoning that a sentence is not "based on" the Guidelines just because a district court considered the Guidelines and used them as a benchmark in determining whether to accept a Rule 11(c)(1)(C) agreement, as the district court did here. Opp. 6-8.

The Government is mistaken. As a matter of plain English, a sentence is "based on" the Guidelines when the district court uses them as a "benchmark" — as district courts *must* do under *Gall*. To be sure, a district court may take into account other considerations, but the statute does not say that the sentence must be *solely* "based on" the Guidelines. Indeed, if the Government were correct, *no* sentence would ever be "based on" the Guidelines because *Gall also* requires sentencing courts to look *beyond* the Guidelines in every case. *See* 128 S. Ct. at 596 (Guidelines "are not the only consideration" in sentencing).

The Eighth Circuit and the Government are wrong to interpret the "based on" language in § 3582(c)(2) as Congress' attempt to draw a distinction between sentences that are imposed through plea agreements and those that are not. The Sentencing Commission has explained that the purpose of the "based on" requirement is to ensure that § 3582(c)(2) is applied to cases where "the guideline range applicable to [the] defendant has subsequently been lowered as a result of" a retroactive amend-

ment, such as Amendment 706. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a) (2008). Thus, an individual convicted of crack-cocaine trafficking is eligible for a reduction only if he was sentenced under § 2D1.1 (the Guideline that was amended), rather than under, say, § 4B1.1 (the "career offender" Guideline that was not amended). *See, e.g.*, *United States v. Martinez*, 572 F.3d 82, 85 (2d Cir. 2009). In short, the "based on" language commands courts to focus on the particular Guideline under which the defendant's sentencing range was determined — *not* on whether the sentence was imposed through a plea agreement. Here, because Mr. Scurlark's range was calculated under § 2D1.1, and because Amendment 706 to § 2D1.1 is "an amendment listed in [§ 1B1.10(c)] that lowers the applicable guideline range" for him, his "[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered." U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. 1 (2008).

The Government ignores all of this, contending that once a court accepts a sentence specified in a Rule 11(c)(1)(C) plea agreement, the court "thereby become[s] bound under the terms of the agreement and Rule 11(c)(1)(C)." Opp. 6. But every sentence is "binding" once imposed. The only difference under Rule 11(c)(1)(C) is that the court is "bound" by law to allow the defendant to withdraw his plea if it decides that the recommended sentence is inappropriate. If it decides instead to accept the agreement of the parties as an appropriate disposition, which almost always is the case, there is no difference at all between an 11(c)(1)(C) agreement and all the other types of plea agreements that the Government concedes should qualify for sentence reductions.

The Eighth Circuit's decision is wrong on the merits and perpetuates the very disparities that § 3582 and the recent amendments to the Guidelines were intended to correct. As the Tenth Circuit explained, "nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefitting from a favorable retroactive guideline amendment." *Cobb*, 2009 WL 3418214, at *4. Accepting the Government's interpretation of the statute would have the perverse result — and one directly contrary to congressional intent — of "leav[ing] defendants who pled guilty before the effective date of the [crack-cocaine] amendment with higher sentences than those who pled guilty afterward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges." *Id.* at *5. The consequence is that defendants, like Mr. Scurlark, who entered Rule 11 pleas before the effective date of the amendment will be "left serving greater sentences on the now-rejected grounds of the 100-to-1 powder-to-crack cocaine ratio." *Id.*

As the Government concedes (*supra* at 1), thousands of these cases are pending throughout the country. Accordingly, there is no reason to permit this circuit split to become more entrenched and to deny individuals the opportunity to request the sentence modifications that Congress and the Sentencing Commission intended to make available. The question is cleanly presented here and this Court should grant review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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